

Draft for public comment only

**ALTERNATIVE CONSULTATION AGREEMENT
FOR IMPLEMENTATION OF OPTIONAL ALTERNATIVE CONSULTATION
PROCEDURES**

**U.S. ENVIRONMENTAL PROTECTION AGENCY
U.S.D.I. FISH AND WILDLIFE SERVICE
U.S.D.C. NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION:
FISHERIES SERVICE**

JANUARY 2004

I. Purpose

This agreement is designed (1) to support implementation of the counterpart regulations found at 50 CFR §402.45 which set forth circumstances under which it is appropriate for the Environmental Protection Agency (EPA) to make the determination that an action under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) is not likely to adversely affect (NLAA) listed species or designated critical habitat, as these terms are used within the context of the Endangered Species Act (ESA), without informal consultation with the Services or written concurrence from the Services; and (2) to ensure that EPA's ecological risk assessment approach will produce effects determinations that reliably assess the effects of pesticides on endangered and threatened species (listed species) and critical habitat pursuant to section 7 of the Endangered Species Act (ESA) and implementing regulations, that appropriately identify actions that are not likely to adversely effect listed species or critical habitat, and that are consistent with those that otherwise would be made by the Services. Throughout this agreement, "Service" or "Services" shall refer to the Fish and Wildlife Service (FWS) and/or the National Marine Fisheries Service (NMFS), as appropriate

II. Goals and Objectives

This agreement is intended to accomplish the following:

- Establish procedures for the implementation of the authorities provided in the counterpart regulations found at 50 CFR §402.45;
- Streamline the consultation process by reducing workload and paperwork currently required for those FIFRA actions that are not likely to adversely affect listed species or critical habitat while maintaining the species protections afforded by current regulations;
- Ensure a nationally consistent process that allows flexibility to deal with site-specific issues.

III. Guiding Principles

The ESA sets forth the goal of protecting and recovering threatened and endangered species and the ecosystems upon which they depend. It places responsibility on all Federal agencies, including the EPA and the Services, to meet that goal. FIFRA is intended to insure that the use of any pesticide will not result in unreasonable adverse effects on the environment. The Services and EPA are entering into this agreement to affirm a partnership to enhance the realization of the goals of both Acts. This partnership will also seek to efficiently and effectively fulfill the requirements of section 7 of the ESA.

The primary principle underlying this agreement is cooperative partnership. The ESA requires the involvement of all Federal agencies in the protection of and recovery of our Nation's biological diversity.

IV. Authorities

(A) Fish and Wildlife Service and National Marine Fisheries Service Authorities

This agreement relates to the following authorities of the Services: the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et. seq.*).

(B) Environmental Protection Agency Authorities

This agreement relates to the following authorities of EPA: the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136 *et. seq.*).

V. Provisions and Understandings

(A) Procedures to Ensure the Adequacy of EPA's Not Likely to Adversely Affect Determinations Under the Endangered Species Act.

The Services and EPA have carefully reviewed the approach EPA uses to assess the potential impacts of pesticide use on listed species and designated critical habitat, including the manner in which EPA will make NLAA determinations. The Services have made suggestions which EPA has adopted in appropriate situations for changes to the approach that should lead to better protection for listed species and habitats. Based on this programmatic evaluation of EPA's methodologies, EPA has prepared a document entitled "Overview of the Ecological Risk Assessment Process in the Office of Pesticide Programs" (January 2004) (Overview). This Overview in part discusses an approach to assessing ecological risks associated with pesticide use that is followed primarily by OPP's Environmental Fate and Effects Division and its Field and External Affairs Division. The Services and EPA agree that the procedures described in this Overview (together with future amendments to these procedures made pursuant to provisions described in V.D. of this Agreement) will produce effects determinations that reliably assess the

1 effects of pesticides on (listed species) and critical habitat pursuant to section 7 of the ESA and
2 implementing regulations. The Services have further concluded that the approach used by OPP
3 should produce effects determinations that appropriately identify actions that are not likely to
4 adversely effect listed species or critical habitat, and that are consistent with those that otherwise
5 would be made by the Services. (Letter from S. Williams and W. Hogarth to S. Hazen, January
6 2004.) EPA and the Services agree that the provisions in this paragraph fulfill the requirements
7 of 50 CFR § 402.45(b)(2)(i).

8
9 (B) Procedures to Ensure that EPA and Service Staff are Adequately Trained to Fulfill Their
10 Responsibilities Under this ACA.

11
12 The Services and EPA agree that staff in all organizations would benefit from a better
13 understanding of the others' regulatory and technical functions. Therefore the Services and EPA
14 will pursue the following activities to provide training to appropriate staff in both the Service
15 and EPA. The Services and EPA agree that the following training will assist the agencies to
16 fulfill their responsibilities in implementing the authorities provided in the counterpart
17 regulations described at 50 CFR §402.45, and the provisions of this ACA.

18
19 (1) EPA staff will receive the appropriate ESA section 7 training provided by the
20 Services prior to implementing the NLAA determination;

21
22 (a) For EPA, "appropriate staff" means a sufficient number of senior risk analysts
23 who are responsible for ecological risk assessment for a FIFRA action;

24
25 (b) Upon completion of the training, each EPA staff person shall be certified as
26 having received the training. Certification shall be considered current provided
27 that certified staff receive periodic, updated training deemed necessary.

28
29 (2) Service staff reviewing section 7 pesticide consultation packages will be encouraged
30 to attend training to further their understanding of the processes employed by EPA in the
31 administration of FIFRA registration actions;

32
33 (3) Service and EPA staff will collaborate in the design of an advanced section 7 training
34 course to address the unique properties and considerations necessary to evaluate FIFRA
35 pesticide registration actions.

36
37 EPA agrees that all NLAA determinations made by EPA pursuant to the subject authorities and
38 responsibilities will be reviewed and concurred on by an EPA staff member who holds a current
39 certification as having received appropriate training. EPA and the Services agree that the
40 provisions in this paragraph fulfill the requirements of 50 CFR § 402.45(b)(2)(ii).

41
42 (C) Procedures to ensure that EPA considers, in a timely and appropriate manner, new
43 information relevant to its prior ESA determinations regarding pesticides.

1 The Services and EPA agree that new information is likely to become available that may
2 be relevant to prior EPA NLAA determinations, and that such information should be evaluated
3 initially by EPA. Therefore, after EPA makes a NLAA determination the following procedures
4 will be used to ensure that EPA considers any new information relevant to a prior NLAA
5 determination or prior no effect determination in a timely and appropriate manner.

6
7 (1) “New information” refers to relevant information that was not considered by EPA in
8 making its prior ESA determination that an agency action involving a specific pesticide
9 either has no effect on or is not likely to adversely affect listed species or designated
10 critical habitat. Such information could include:

11 (a) information which reveals that use of the pesticide may affect listed species or
12 designated critical habitat in a manner or to an extent not previously considered;

13 (b) modification of the prior agency action in a manner that causes an effect on
14 listed species or designated critical habitat that was not previously considered; and

15 (c) listing of a new species or designation of critical habitat that may be affected
16 by the prior agency action.

17
18 (2) The Services may review the published scientific literature to identify new
19 information relevant to prior EPA determinations and provide citations or copies of such
20 literature to EPA’s Office of Pesticide Programs.

21
22 (3) EPA will publish a notice in the Federal Register describing how the public may
23 bring new information to EPA’s attention. In addition, the Notice will remind pesticide
24 registrants of their obligations under FIFRA sec. 6(a)(2).

25
26 (4) EPA will review all new information, together with other available, relevant
27 information, to reassess the potential effects of the pesticide on listed species and
28 designated critical habitat. If EPA determines the pesticide is likely to adversely affect
29 any listed species or designated critical habitat, EPA shall initiate formal consultation
30 with the appropriate Service, using the appropriate procedures of either Subpart B or
31 Subpart D of 50 CFR 402.

32
33 EPA and the Services agree that the provisions in this paragraph fulfill the requirements of 50
34 CFR §402.45(b)(2)(iii).

35
36 (D) Procedures to ensure EPA incorporates advances in the science of ecological risk
37 assessment in making ESA determinations regarding pesticides.

38
39 The Services and EPA agree that it is important to establish processes that encourage the
40 incorporation of advances in the science of ecological risk assessment into the approach that
41 EPA uses to make determinations regarding the impacts of pesticides on listed species or
42 designated critical habitat. In order to provide for the continued improvement of the approach
43 by which EPA assesses pesticides and to ensure that any future changes to EPA’s approach

1 continue to produce effects determinations that reliably assess the effects of pesticides on listed
2 species and critical habitat pursuant to section 7 of the ESA and implementing regulations, and
3 that appropriately identify actions that are not likely to adversely effect listed species or critical
4 habitat, and that are consistent with those that otherwise would be made by the Services, EPA
5 and the Services have agreed on the following procedures:
6

7 (1) EPA will notify the Services in writing if EPA proposes to make changes to its
8 approach to assessing the potential ecological risks posed by use of a pesticide or to
9 determining whether such risks are not likely to adversely affect a listed species or
10 designated critical habitat, as described in EPA's Overview or amendments to that
11 document. EPA's notice will describe and explain the reasons for the proposed change.
12 The Services will promptly review any proposed changes and will provide written
13 responses indicating whether the Services support implementation of the change,
14 together with the reasons for their positions. EPA will not make any changes to the
15 approach described in the Overview document until the Services concur on the change
16 or, if the Services do not respond, until 90 days after providing notice to the Services,
17 whichever is sooner. If a Service does not support the change, EPA will not make the
18 change pending resolution of the disagreement, and any disagreement may be referred to
19 the Coordination Communication, and Implmenetation Panel (CCIP) described in
20 Section V(G) of this ACA.
21

22 (2) The Services may recommend that EPA change its current approach to assessing the
23 potential ecological risks posed by use of a pesticide or to determining whether such
24 risks are not likely to adversely affect listed species or designated critical habitat. EPA
25 will promptly review any recommended changes and will provide a written response
26 indicating whether it supports implementation of the change, together with the reasons
27 for its position. In the event that EPA does not respond within 90 days or does not
28 support the implementation of the change, the disagreement may be referred to the CCIP
29 described in Section V(G).
30

31 (3) To achieve the objectives of the Section, EPA and the Services will meet on an
32 annual basis, or more frequently as may be deemed appropriate. Through these
33 meetings, EPA and the Services intend to identify new research and other activities that
34 might have promise for leading to ways to improve the current approach to assessing the
35 potential ecological risks posed by use of a pesticide to listed species or designated
36 critical habitat.
37

38 (4) Recommendations to change EPA's current approach to assessing the potential
39 ecological risks posed by use of a pesticide may be reviewed by EPA's Scientific
40 Advisory Panel (SAP) before implementation by EPA. If a recommendation jointly
41 developed by EPA and Services is deemed appropriate for review by the SAP, the
42 Services will assist in any presentation to the SAP upon request by EPA.
43

EPA and the Services agree that the provisions in this paragraph satisfy the requirement in 50 CFR 402.45(b)(2)(iv).

(E) Procedures EPA will use to inform the Services of its NLAA determinations.

(1) EPA will make available to the Services and to the public all NLAA determinations it has made with respect to pesticides under the provisions of 50 CFR 402.45(a), by posting such determinations on its website. At the request of a Service, EPA will provide documentation of the basis for its determination.

(2) EPA will provide an annual report to the Services identifying all “new information” that EPA received relating to a prior NLAA determination and summarizing EPA’s evaluation of such information. At the request of a Service, EPA will provide documentation of its evaluation of such information.

EPA and the Services agree that the provisions in this paragraph satisfy the requirement in 50 CFR 402.45(b)(2)(vi).

(F) Oversight of EPA’s Implementation of the Pesticide Counterpart Regulations and the Alternative Consultation Agreement

This oversight process will provide a programmatic review of EPA’s exercise of its authority pursuant to 50 CFR §§ 402.45. The Service and EPA agree that periodic program evaluation of EPA’s implementation of the procedures described in this ACA will serve to ensure NLAA determinations made by EPA appropriately identify actions that are not likely to adversely effect listed species or critical habitat, and are consistent with those that otherwise would be made by the Services. The program review will be conducted at mutually agreed time intervals consistent with the provisions of 402.45(b)(2)(iii) and will involve examination of previous NLAA determinations made by EPA. The Services and EPA agree that the following procedures will be followed when any such review is conducted:

(1) The periodic program review will evaluate the past NLAA determinations made by EPA in implementing procedures described in Section V(A) of this ACA to protect listed species or designated critical habitat. The review will focus on how EPA has applied the appropriate standards to make the NLAA determination consistent with the ESA and the applicable section 7 regulations. In conducting the review, the Services and EPA will take into consideration EPA’s Overview as well as any potential advances adopted through the procedures described in Section V(D) of this ACA.

(2) All reviews conducted will be conducted by a joint, inter-agency review team familiar with the ESA and including members of the CCIP described in Section V(G) of this ACA

(3) All reviews will be conducted by persons who have at least 5 years experience with the administration of the ESA, or who have received training outlined in Section V(B)(3) of this ACA .

(4) All reviews completed in fulfillment of this requirement will be accompanied by a written report detailing the findings of the review, including any appropriate recommendations regarding either programmatic or specific NLAA determinations. EPA will respond in writing within 60 days to any findings or recommendations from the review team.

The Services and EPA agree that the provisions in this paragraph satisfy the requirements in 50 CFR §402.45(b)(2)(iii) and (v).

(G) Coordination, Communication, and Implementation Panel

The Coordination, Communication, and Implementation Panel (CCIP) consists of appropriate personnel from the participating agencies. The CCIP provides coordination for and oversees the implementation of all aspects of this agreement. Its functions include, but are not limited to:

- (1) Maintaining and updating process guidance;
- (2) Addressing issues about process implementation;
- (3) Incorporating/identifying improvements and revisions into the process;
- (4) Identifying scientific or risk assessment issues to be addressed through the process described in Section V(D) of this ACA;
- (5) Facilitating reaching consensus on particular issues at any level upon requests by personnel at that level; and
- (6) Reviewing and evaluating, at least on an annual basis, the agreement and its implementation by the three agencies.

VI. Revisions or Amendment to Agreement

This agreement is not a legally binding regulation and the Services and EPA may jointly decide to revise, amend, or act at variance from the agreement without conducting notice and comment rulemaking under §553 of the Administrative Procedure Act. If, however, the Service and EPA do decide to revise, amend or vary from this agreement, the Services and EPA will provide an explanation for the actions taken.

VII. Reservation of Agency Positions

No party to this agreement waives administrative claims, positions, or interpretations it may have with respect to the applicability or the enforceability of the ESA or FIFRA.

VIII. Obligations of Funds, Commitment of Resources

Nothing in this agreement shall be construed as obligating any of the parties to the expenditure of funds in excess of appropriations authorized by law or otherwise committing any of the agencies to actions for which it lacks statutory authority. It is understood that the level of resources to be expended under this agreement will be consistent with the level of resources available to the agencies to support such efforts.

IX. Nature of Agreement

This agreement is intended only to improve the internal management of EPA and the Service and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person. This agreement does not modify existing Agency authorities by reducing, expanding, or transferring any of the statutory or regulatory authorities and responsibilities of any of the signatory agencies.

XI. Effective Date; Termination

This agreement will become effective upon signature by each of the parties hereto. The Service and EPA agree that any party may withdraw its participation in the ACA at any time, subject to the following:

(A) Withdrawal shall be based on a reasonable belief that the ACA, or implementation of the ACA, has not and likely will not achieve any one of the following criteria:

- (1) produce effects determinations that reliably assess the effects of pesticides on listed species and critical habitat pursuant to section 7 of the ESA and implementing regulations;
- (2) produce effects determinations that appropriately identify FIFRA actions that are not likely to adversely affect listed species or critical habitat;
- (3) satisfy relevant requirements of the ESA or implementing regulations; or
- (4) satisfy relevant requirements of FIFRA or implementing regulations.

(B) No party shall withdraw from the ACA unless the following actions have been undertaken:

- (1) Any issue deemed a potential cause for withdrawal shall initially be submitted to the CCIP described in Section V(G) for possible resolution.
- (2) No withdrawal shall be effective unless and until 21-day advance written notice has been provided to the Secretary(s) and Administrator, respectively, of each party to the ACA, and such notice shall not be submitted until at least 21 days after the issue has

1 been submitted to the Assistant Secretary(s) and Assistant Administrator for resolution.
2

3 (C) Notwithstanding the above, this ACA may be terminated or suspended by mutual written
4 agreement of the parties at any time.
5

6 (D) Withdrawal from this ACA by any party shall not affect the need to consult informally or
7 to obtain concurrence on any NLAA determination made before the effective date of that party's
8 withdrawal.
9

10 **XI. Signatories**

11 Dated:

12
13 *Assistant Administrator, Office of Prevention, Pesticides and Toxic Substances,*
14 *Environmental Protection Agency*

15 Dated:

16
17 *Director, U.S. Fish and Wildlife Service*

18 Dated:

19
20 *Administrator, National Marine Fisheries Service*

21 Dated:
22
23